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No. 76-154

In the Supreme Court of the United States

OCTOBER TERM, 1976

HENRY BOOK, ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 4A-5A) is reported at 532 F. 2d 877. The decision and order of the National Labor Relations Board (Pet. App. 18A-31A) are reported at 219 NLRB No. 148.

JURISDICTION

The judgment of the court of appeals was entered on May 13, 1976. The petition for a writ of certiorari was filed on August 3, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the circumstances of this case, the Board properly refused to give conclusive effect to the

results of a third-party authorization card check in determining whether a union represented a majority of petitioners' employees at the time that petitioners recognized the union.

STATEMENT

Petitioners are members of a partnership that operates Sprain Brook Manor Nursing Home in Westchester County, New York. In February 1974, Local 999, International Brotherhood of Teamsters ("the Union") claimed, on the basis of signed authorization cards, to represent a majority of petitioners' employees (Pet. App. 18A). By agreement between petitioners and the Union, the cards were inspected by an arbitrator, who concluded "from his own observation, and not as a handwriting expert" that a majority of petitioners' employees apparently had chosen the Union as their collective bargaining representative (Pet. App. 18A).[1] On February 20, 1974, petitioners recognized the Union as representative of a unit composed of all kitchen employees, maintenance employees, physical therapy aides, recreation aides, nurses' aides, licensed practical nurses and registered nurses, and two days later petitioners and the Union executed a contract covering a unit of these employees except registered nurses and licensed practical nurses.[2] The contract contained a union shop provision (Pet. App. 19A).

Less than a month after petitioners and the Union had executed the collective bargaining agreement, Local 1199, Drug and Hospital Union, filed an unfair labor practice charge against petitioners, alleging that they had recognized the Union at a time when the Union did not represent a majority of their employees. At the hearing held on Local 1199's charge, 70 employees, constituting a majority of the workers in both the unit recognized by petitioners and the unit covered by the contract, testified that they had never signed authorization cards for the Union or otherwise authorized the Union to represent them (Pet. App. 19A). The authorization cards were not presented at the hearing, having been destroyed pursuant to the Union's policy of not keeping cards once recognition and a contract had been achieved (Pet. App. 18A-19A).

Based on this evidence, the Board found that petitioners had recognized the Union at a time when it did not represent a majority of their employees, in violation of Section 8(a)(2) of the National Labor Relations Act, as amended, 61 Stat. 140, 29 U.S.C. 158(a)(2) (Pet. App. 23A-24A). The Board also found that petitioners had violated Section 8(a)(3) of the Act, 29 U.S.C. 158(a)(3), by entering into a union shop agreement with a union that did not represent a majority of the employees (Pet. App. 24A-25A). In reaching its conclusions, the Board held that the authorization card count—to which neither Local 1199 nor the employees had been a party—was insufficient proof that a valid card majority existed on February 20 in the face of the employees' contrary testimony and the absence of the cards (Pet. App. 21A-23A).

The Board therefore ordered petitioners, *inter alia*, to cease supporting the Union and giving effect to the contract, to withdraw recognition from the Union unless and until it was duly certified by the Board, and to reimburse employees for any union dues or fees paid under the contract (Pet. App. 25A-27A). The court of appeals enforced the Board's order in a *per curiam* opinion (Pet. App. 4A-5A).

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[1] Fifty-nine cards out of a unit of 101 employees were submitted to the arbitrator, who verified 54 of the cards (Pet. App. 7A).

[2] The contract unit consisted of only 77 employees (Pet. App. 19A).

ARGUMENT

The law is clear that it is a violation of Section 8(a)(2) of the Act, 29 U.S.C. 158(a)(2), for an employer to recognize a union that does not in fact represent a majority of the unit employees even though the employer may have believed in good faith that the union had obtained majority status. *International Ladies' Garment Workers' Union* v. *National Labor Relations Board*, 366 U.S. 731, 738-739. Thus, the sole issue presented here is whether the Board properly refused to accord conclusive weight to the authorization card check in determining the Union's majority status on February 20. That issue, which rests on the particular facts of this case, does not warrant further review.

The Board's decision to accept the unrebutted testimony of petitioners' employees rather than the results of the card check was within its discretion. First, the employees testified—subject to cross-examination—within a short time after petitioners had recognized the Union, and the number of workers who denied ever supporting the Union was substantially more than half of the recognized or contract unit. Moreover, as the Board noted (Pet. App. 24A, n. 11), the contract unit was considerably smaller than the bargaining unit for which cards were submitted.[3] Finally, in light of the fact that the Union had destroyed the best evidence—the authorization cards—it would have been inequitable to have relied solely on the card check

[3]Although the card check was conducted in a unit of 101 employees, the contract unit contained only 77 employees. Since the cards were destroyed by the Union, there was no way of knowing which names were on the 54 cards validated by the arbitrator. If only 16 of the card signers had been members of the groups excluded from the contract unit, the remaining 38 signers would have constituted a minority of the 77-employee contract unit.

in ruling against the employees or Local 1199 in circumstances where neither had agreed to or participated in the check.[4]

Contrary to petitioners' contention (Pet. 6-8), the Board's decision is not inconsistent with the deference normally paid to the arbitral process in unfair labor practice proceedings.[5] This case does not involve grievance arbitration, but rather the evidentiary weight to be given the results of a third-party card check in the absence of the cards themselves. In any event, the Board frequently declines to defer to arbitration where, as here, neither the employer nor the union is aligned in interest with the affected employees, since in such cases the employees are not actually represented at the arbitration proceeding. See *T.I.M.E.-DC, Inc.* v. *National Labor Relations Board*, 504 F. 2d 294, 302-303 (C.A. 5); *Kansas Meat Packers*, 198 NLRB 543, 544.[6]

[4]Contrary to petitioners' contention (Pet. 5), an employer who, like petitioners, has committed no other unfair labor practice has no duty to agree to a card check. Where an employer has committed unfair labor practices which preclude the possibility of a fair election, the Board may issue a bargaining order based on authorization cards which have been verified in a Board proceeding. *National Labor Relations Board* v. *Gissel Packing Co., Inc.*, 395 U.S. 575, 610-611.

[5]When an arbitration award resolves a factual question common to both a grievance arising under a collective bargaining agreement and a Board proceeding, the Board will ordinarily defer to the award "unless it clearly appears that the arbitration proceedings were tainted by fraud, collusion, unfairness or serious procedural irregularity or that the award was clearly repugnant to the purposes of the Act." *International Harvester Co.*, 138 NLRB 923, 927, affirmed *sub nom. Ramsey* v. *National Labor Relations Board*, 327 F. 2d 784 (C.A. 7), certiorari denied, 377 U.S. 1003. See also *Carey* v. *Westinghouse Electric Corp.*, 375 U.S. 261.

[6]See also *National Labor Relations Board* v. *Plasterers' Local Union No. 79*, 404 U.S. 116, 136-137, where this Court held that in a proceeding arising under Section 10(k) of the Act, 29 U.S.C. 160(k), the Board correctly declined to defer to an arbitration procedure that had not been agreed to by all interested parties.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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